> The audit team reviewed the interface, but did not review the performance of the legacy systems supporting the interface, i.e., end-to-end integration.
>
> The audit team made no attempt to determine whether or not Ameritech was meeting its service commitments with telecommunications carriers.[20]

The Staff concluded that "it [is] clear that there are still significant problems with Ameritech's OSS, including double billing, rejected orders, and manual processing," ICC Staff Br. 18, and that "it is clear from the evidence adduced at the supplemental stage of this proceeding that Ameritech has still not implemented electronic interfaces for repair and maintenance functions." Id. at 20.

And now the MPSC has reached the same conclusion. Concluding that most of Ameritech's OSS has never been put to use, and faced with overwhelming evidence that the limited OSS in use did not work up to adequate standards, the MPSC concluded that Ameritech has not met its burden of proving that its OSS works and satisfies the checklist. In particular, the MPSC concluded:

> Ameritech was unable to defend the performance standards it set for itself, and failed to carry its burden of proving that its performance was adequate (MPSC June 9 Comments at 28);
>
> Ameritech fails "in many cases, [to] provide measures of Ameritech's own operations on which parity judgments can be made." Id. at 29.
>
> Ameritech fails to rationally explain "how some proposed standards will be measured." Id.
>
> Ameritech has not proved that its OSS satisfies the 1996 Act's parity and nondiscrimination requirements. Id. at 31.
>
> Ameritech must adopt detailed performance standard "before a positive determination can be made by the FCC regarding Ameritech's compliance with this checklist item." Id. at 38.

Ameritech now produces the same evidence, and the same witnesses, that were rejected in

[20]Supplemental Initial Brief of the Staff of the Illinois Commerce Commission in Investigation Concerning Illinois Bell Telephone Co's Compliance With Section 271(c), No. 96-0404 ("ICC Staff Br."), at 17.

Michigan, Wisconsin and Illinois. Its centerpiece again is the Andersen study. It produces no evidence that suggests it has solved the problems identified by its own state regulators in three recent fully contested hearings devoted to OSS.

Ameritech's OSS suffer from the following generic defects:

(a) Manual intervention. Many checklist items, such as complex resale orders, most centrex or ISDN orders, can be ordered only by fax or telephone, with Ameritech's representative then manually re-entering the request into Ameritech's computers. See King Aff. ¶¶ 32, 50-51, 53. Ameritech lacks an automated interface for error notification, jeopardy notification, and completion notification for unbundled elements. And even where Ameritech delivers electronic OSS -- almost exclusively only with "POTS" resale -- far too many orders "fall out" and have to be manually addressed. Id. ¶ 79-91, 143. Brooks' experience with Ameritech's non-standard and inappropriate ASR interface for loop ordering suggests that this electronic process is tantamount to a manual system, with loop orders having to be faxed and re-faxed repeatedly. Id. ¶ 124, ex. 13, pp. 158-160.

Manual intervention causes delay, introduces errors, and frustrates order handling on a commercially significant scale. King Aff. ¶¶ 15, 80-82, 91. By failing to automate, Ameritech holds its competitors hostage to its own response time, hours of operation and ability (or incentive) to provide accurate information. Id. ¶ 15. The inevitable result is what the Ameritech experience shows: delays, errors, "lost" orders and unreliable processes. Id. ¶¶ 33, 75-78, 91-98, 105-07, 140-42. Also, manual arrangements increase CLECs' costs. Id. ¶ 15. A new entrant cannot compete against Ameritech when it is forced to resort to Ameritech's manual access arrangements.

(b) Non-standardized interfaces. OSS interfaces for all the ILECs must be uniform. King Aff.

¶ 20-21. "Adherence to industry standards is more a floor than a ceiling." DOJ SBT Evaluation at 73, n.100. The time and capital investment required for CLECs to develop non-standard OSS interfaces represent an insuperable barrier to entry. Ameritech acknowledges this as a general matter, but in critical respects still clings to proprietary and non-standard interfaces.[21] It is critical that Ameritech deploy these interfaces not just because they will be standard, but also because these interfaces provide important functionalities that do not exist in Ameritech's present systems.[22]

(c) Failure to provide demonstrably functioning systems. Even where Ameritech claims that it has made available appropriate electronic interfaces that meet industry standards, those interfaces have not been shown to work in practice. If Ameritech's resale experience shows anything, it is that systems that supposedly pass every Ameritech test do not necessarily work when put to commercial use. King Aff. ¶ 50, 54, 114. And virtually none of Ameritech's OSS for complex resold services or for unbundled elements has been put to use. Id. ¶ 115-116, 131-33. Congress asked the Commission to evaluate commercial experience, not the spin of Ameritech's paid consultants who assure us -- all experience to the contrary -- that Ameritech's unproven OSS will work as advertised. The checklist items promised through such unproven OSS procedures are not fully implemented.

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[21] For example, Ameritech has not deployed or committed to deploy industry standard Feature Identification Codes for ordering, or Carrier Access Billing System Billing Output System ("CABS BOS") format for billing CLECs for resold services. King Aff. ¶ 112, 163. Neither does Ameritech today provide industry standard LSR loop provisioning. Id. ¶ 123. Finally, despite its claim to provide daily usage feeds in industry standard EMR format, Ameritech continues to provide them to MCI in EMI format. Id. ¶ 159.

[22] For example, Ameritech's deficient ASR loop ordering interface makes it extraordinarily difficult to coordinate the provisioning of the loop with the accompanying disconnect and interim number portability, which must be sent either manually or through an EDI process. King Aff. ¶ 125.

ii. Pricing. There is no warrant in §§ 251, 252, or 271 for non-cost-based rates. The Commission correctly concluded that only TELRIC rates as defined in its Local Competition Order satisfy the Act and permit local competition to develop using unbundled network elements. And the Commission has recognized that interim rates must be replaced with permanent rates based on cost. Local Competition Order ¶ 693. In its order setting the interim rates here, the MPSC found that "flaws still exist" in the cost studies on which it relied, although they "more closely correspond to the methodology required by the [1996] Act and prior Commission orders than those submitted previously." Order of Dec. 12, 1996, in Cases No. U-11155, -11156, at 7. Given these flaws, the MPSC found it necessary to open a new price docket to determine true cost based rates. Order of Dec. 12, 1996 in Cases No. U-11280, -11281, -11224 (submitted as attachment 11 to February 5 Comments of MPSC). The MPSC indicates that permanent rates will be set in this docket in June 1997. MPSC Comments at 11. By filing just in advance of the MPSC's release of final prices, Ameritech leaves both its regulators and its competitors without the information necessary to make either regulatory or investment decisions. As the DOJ observed in an analogous situation in Oklahoma, DOJ SBC Evaluation at 61-63, potential competitors face a substantial barrier to entry when they must make investment decisions based on non-cost-based interim rates that will not be converted into final, cost-based rates until sometime after the Commission considers the application. Added to this uncertainty, Ameritech (along with other BOCs) has argued to the Eighth Circuit that the forward-looking basis upon which both the FCC and the MPSC have set rates is both unlawful under the Act and unconstitutional. The Eighth Circuit subsequently stayed the FCC's pricing rules, and its decision on the merits of this claim is sub judice. Until these uncertainties are eliminated, and the Commission can satisfy itself that the rates are cost-based, it cannot find that Ameritech has fully implemented this requirement of the checklist.

Moreover, the true costs of Ameritech's offerings is obscured by its extensive reliance on non-recurring charges, charges assessed on a lump sum, rather than on an amortized, basis. These charges (and, so, the real cost of reselling Ameritech's services or leasing its network elements) are exorbitant, aimed at obtaining multiple recovery of costs and erecting high barriers to entry. Davis Aff. ¶¶ 26, 38. For example, Ameritech proposes a $33,669.71 charge per carrier per unbundled switch to allay the cost of updating switch software. Even taking Ameritech's claimed costs as true, a proper allocation of the costs across entrants and switches would result in a per switch per carrier charge of $100-$150. Ankum Aff. ¶¶ 6-7. In order to impose a charge more than 200 times higher, Ameritech "assumed" that on average each CLEC would use only one switch per state to provide local service. Id. ¶¶ 34-38. This is a preposterous assumption.

Ameritech's proposed charges for collocation cages are equally unreliable. Ameritech begins with a square foot price set in a guide that already included amounts for planning, engineering, building and maintaining the space plus all additional support space (entry, stairs, mechanical equipment, etc.) required. For good measure it then arbitrarily doubles the figure indicated in the guide, allegedly "to account for support space," the cost of which is already factored in. Similarly, Ameritech adds a one-time charge of more than $29,000 for construction even though all construction costs are also already included in the per square foot figure. Ankum Aff. ¶¶ 8-9, 39-55. Similar multiple recoveries are demanded in the ordering charge ($1,000) and the cancellation charge ($4,130); the latter also includes an extraordinary "asbestos assessment" fee (the amount of which is subject to Ameritech's protective order), as if Ameritech was planning to install asbestos in areas to be used by new entrants, which then had to be removed when they left. Id. ¶ 11-12, 59-61. Interim fees for ordering unbundled elements are based on manual rather than available automated processes, and so are 38 times higher than real economic cost. Ameritech now proposes to raise them even higher. Id. ¶¶ 13-14, 62-76.

Ameritech's proposed approach to recurring charges is no more consistent with the checklist. For example, Ameritech inflates its loop and switch charges by using different capacity usage factors than it uses in its own cost manuals. Ankum Aff. ¶¶ 16, 18, 79-83, 96-101. Proper efficiency assumptions would lower the cost, for example, of loops to new entrants by at least 20 percent. Id. ¶ 16-17. Another area where Ameritech frustrates entry is joint and common costs. Ameritech imposes, on new entrants alone, its fees to the attorneys and economists representing *Ameritech's* interests in §§ 252 and 271 and related proceedings. Only an obdurate monopolist would conceive of charging its potential competitors for its expenses of frustrating competitive entry. To make matters worse, Ameritech assumes that the costs of attorneys and economists years into the future will be as high as in the first year after the Telecommunications Act was passed, and then imposes those phantom costs solely on new entrants. Ankum Aff. ¶¶ 28, 177-179. With this, and many other misallocations, Ameritech hikes just this one category of costs up a full 50 percent.[23]

The result of all of this manipulation is that Ameritech's proposed charges constitute an insurmountable barrier to entry that makes it virtually impossible for competitors like MCI to compete

[23]The attachment to the Ankum Affidavit lays out in graphic form the full extent to which Ameritech's recurring and non-recurring charges violate the Act.

profitably in Ameritech's lucrative market. Davis Aff. ¶ 25-27.

iii. Other Checklist Items. In addition to these deficiencies, the Sanborn and King affidavits describe in detail the many ways in which Ameritech fails to satisfy the competitive checklist. In what follows we highlight of few of the more glaring failures.

a) **Collocation** (checklist items i, ii, and iv): "The availability of physical collocation is critical to a competing local provider's ability to interconnect and to serve local exchange customers through the use of unbundled elements." DOJ SBC Evaluation at 31. Thus, MCI prefers to order unbundled loops only when physical collocations are in place. Sanborn Aff. ¶ 14. Ameritech has not provided a single operational physical collocation to any CLEC in Michigan.

Additionally, although two-way trunks are the most efficient for interconnection trunking, and although MCI, for one, has requested two-way trunks, Ameritech has provided only one-way trunks. Sanborn Aff. ¶ 18. This unnecessarily raises CLECs' costs and impairs the flexibility of their networks.

b) Unbundled Elements (checklist item ii): Ameritech has never furnished any CLEC with combinations of unbundled elements, and it has not yet implemented the necessary processes that would make this possible. Sanborn Aff. ¶ 23. Moreover, although subloop unbundling is technically feasible, Ameritech will not provide for unbundled access to distribution facilities except via the cumbersome and time consuming bona fide request ("BFR") process. This process unreasonably impairs CLECs' access to unbundled distribution facilities, thus impeding competitive development. Sanborn Aff. ¶¶ 20-22.

c) Unbundled loops (checklist item iv): Loop provisioning purportedly is mechanized through the non-standard ASR interface, but Brooks' experience suggests that loop provisioning is in fact an arduous manual process.[24] Moreover, the disconnect and interim number portability that typically accompany loop provisioning are not coordinated automatically with the loop provisioning. Such a system may barely be adequate to provision 10,000 loops in seven months, as Ameritech claims, Br. 43, but there are over 5.5 million loops in Michigan. If loops are to be provisioned in significant commercial quantities, a coordinated, automatic, standardized system is required. King Aff. ¶ 124. Ameritech recognizes as much -- pressed by the Michigan Commission, it just recently promised to sit down with its competitors to develop such a system. MPSC Hearing at 20. Until it has developed the industry standard LSR/EDI interface coordinating all transactions necessary to loop provisioning, Ameritech has not satisfied this checklist item, and its competitors cannot order loops in commercially significant quantities.

d) Unbundled transport (checklist item v): Ameritech concedes that it has never provided unbundled transport pursuant to an interconnection agreement -- indeed, the Brooks agreement upon which it relies does not even include provisions for unbundled transport. Br. 45. Ameritech acknowledges that competitors have indeed attempted to order this item, but have not succeeded, because it was not, according to Ameritech "properly ordered." Id. This is another checklist item that Ameritech has entirely failed to satisfy. Moreover, in its agreements covering this checklist item, Ameritech continues to refuse to provide at cost-based rates common transport over the same trunks that carry Ameritech's traffic. Common transport is a "technically feasible transmission . . . feature[],

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[24]Hearing Before the MPSC, Case No. U-11104 (May 28, 1997) ("MPSC Hearing"), at 166-173.

function[] [or] capabilit[y]," 47 C.F.R. § 51.319(d)(2)(ii), and therefore is required by the checklist. Ameritech's refusal to provide common transport forces CLECs to purchase dedicated transport between specified points, rather than terminating traffic throughout Ameritech's network on a call-by-call basis, and thus prevents CLECs from reaching new customers in the most cost-effective manner. Sanborn Aff. ¶¶ 35-39. Ameritech's position unnecessarily and unreasonably increases the cost of starting up and expanding competitive local service, and does not satisfy its obligations under the checklist.

e) **Unbundled switching** (checklist items ii and vi): Ameritech does not provide unbundled switching to any CLEC. Moreover, none of Ameritech's contracts with what it claims to be facilities-based providers provides for unbundled switching, and this element is not available to those competitors through their contracts' MFN clauses. See pp. 8-10, supra. Finally, Ameritech has steadfastly refused to develop support systems or test unbundled switching (or other unbundled network elements that are not available through tariff) with competitors like MCI with whom it has no approved interconnection agreement. Id.[25] Ameritech has taken this position even though it has completed negotiation of its contract with MCI, and has negotiated a contract that provides for unbundled switching. Id.

Additionally, unbundled switching is not priced at TELRIC rates, Sanborn Aff. ¶¶ 65-69, and Ameritech has announced that it intends to collect access charges derived from both originating and terminating interexchange traffic -- access charges that plainly belong to the purchasers of the

[25] Unbundled switching is not available through tariff in Michigan. See Sanborn Aff. ¶¶ 56-57.

switching. Sanborn Aff. ¶¶ 71-72.

Although MCI for reasons stated has been effectively barred from developing unbundled switching with Ameritech until the Ohio commission finally approved its interconnection agreement on May 22, MCI has made it clear to Ameritech that unbundled switching is critical to its entry plans in Michigan. Sanborn Aff. ¶ Ex. 1, Ex. 3. Ameritech only very recently has made unbundled local switching available even on a test basis. MCI placed a test order just as soon as it became available. Sanborn Aff. ¶ 58. And it has subsequently placed orders further testing Ameritech's new unbundled local switching offering. Sanborn Aff. ¶ 60, Ex. 4.

Over the next several months, so long as Ameritech continues to have the regulatory incentive to cooperate with its local rivals, the business practice and OSS required to provide unbundled switching may be developed. They are not in place now, Ameritech's protestations to the contrary notwithstanding.

Moreover, according to Ameritech's own Kocher affidavit, AT&T too has requested unbundled local switching, as part of its May 13 "Ameritech/AT&T Unbundled Network Elements Trial Guidelines." Kocher Aff. ¶ 71. Indeed, Ameritech "acknowledges" that this application "could be delayed or denied" if it turns out it cannot unbundle the switch in this trial, id., or in a subsequent "multi-switch trial" it is performing with AT&T on June 23. Id. at ¶ 72.

But this Commission has made clear that BOCs have the burden in § 271 applications to prove at the time the application is filed that they have "fully implemented" the requirement that they "provide" each checklist item. In the Matter of Application by Ameritech, FCC 97-40, CC Docket No. 97-1, Order of Feb. 7, 1997, ¶ 22. Ameritech cannot meet this test. It acknowledges that as of

May 21 it had contracted with no facilities-based provider to provide unbundled switching, and that it had provided no competitor with unbundled switching (or unbundled transport) even though it was addressing an outstanding request to test unbundled switching that had not yet been satisfied. Br. 36, 45. Under the Commission's rules, and under any plausible interpretation of the requirements of § 271,[26] this is simply not good enough.

This is no mere technical deficiency. Unbundled switching is an important part of MCI's facilities-based strategy for entry into the Michigan market. Pure facilities-based entry on any large scale requires an extraordinarily large investment in physical plant. Class 5 switches cost approximately $10 million, collocations cost hundreds of thousands each, and Ameritech operates some 440 central office switches in Michigan. Sanborn Aff. ¶ 48. Even leaving aside Ameritech's wildly inflated non-recurring charges, and leaving aside the billions of dollars it would cost to replicate Ameritech's loops and trunks in Michigan, it would cost in excess of $4.4 billion to compete switch for switch with Ameritech in Michigan. MCI wants to be a switch-based competitor to Ameritech in Michigan. Davis Aff. ¶ 15. By using its own switches and external databases, MCI will be able to offer Michigan consumers different and innovative services not available on Ameritech's network. Because it is virtually impossible for MCI or any other competitor immediately to invest the billions of dollars of capital necessary to replicate all of the switches in Ameritech's network, access to unbundled local switching is needed to develop facilities-based competition in the state. Id.; Sanborn Aff. ¶¶ 46-50.

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[26] See, e.g., DOJ SBC Evaluation at 23 ("Nor does an offer to provide a checklist item at some time in the future constitute 'providing' it"); id. (actual use not required "at least where no competitor is actually requesting and experiencing difficulty obtaining that item").

MCI has acted promptly to work with Ameritech to develop unbundled local switching capability. It is frivolous for Ameritech to suggest that it has fully implemented the requirement to provide this critical and complex checklist item, when it is only beginning to explore with its competitors its technical requirements, and when its competitors have just recently been provided with the specifications that are necessary to start the process of developing the necessary business practices and OSS to deliver this product.

f) OS/DA (checklist item vii): In most cases, Ameritech will not use customized routing to rebrand Operator Service ("OS") and Directory Assistance ("DA") calls with the reseller's name except through the BFR process. This imposes unwarranted delay and expense. The alternative, however, is that OS and DA calls will carry the Ameritech brand unless CLECs route these calls to Ameritech on inefficient and costly dedicated trunks. Sanborn Aff. ¶ 89. The Commission has held that "failure by an incumbent LEC to comply with reseller branding requests presumptively constitutes an unreasonable restriction on resale." Local Competition Order, ¶ 971.

Ameritech is required to provide nondiscriminatory access to directory assistance databases.[27] But, again, Ameritech requires CLECs to use a BFR to gain access to such databases. See Sanborn Aff. ¶ 30. The BFR process can easily be manipulated by Ameritech to delay access. Checklist compliance requires that a standard, technically feasible unbundled element be made available in a prompt and mutually-agreed upon manner, not through the BFR process.

Ameritech has also refused to provide directory listings, from its own database, of customers

[27] See Implementation of the Local Competition Provision of the Telecommunications Act of 1996, CC Docket 96-98, Second Report and Order, F.C.C. No. 96-333 ("Second Report and Order") ¶¶ 135, 142, 143; Local Competition Order ¶¶ 534, 538.

of Michigan's many small independent LECs. Sanborn Aff. ¶ 29. Any customer of a competing provider "should be able to access any listed number on a nondiscriminatory basis, notwithstanding . . . the identity of the telephone service provider for the customer whose directory listing is requested." Second Report and Order ¶ 135 (emphasis added). Ameritech's refusal to provide access to the entire centralized DA database it maintains, on the grounds that some of the customers listed have other local telephone providers, violates the Commission's rules.

g) Reciprocal compensation (checklist item xiii): Ameritech's refusal to provide for reciprocal compensation with respect to switching functions violates the checklist. Under its agreements, Ameritech may impose additional charges for traffic that goes through tandem switches used to terminate calls from CLECs' customers. But CLECs may not impose similar charges on Ameritech for the use of the CLECs' switches that perform the same function as Ameritech's tandems. See, e.g., Sanborn Aff. ¶¶ 81-85.

h) Resale (checklist item xiv): Ameritech's resale operations are plagued by manual processing. Thus, Ameritech has no mechanized OSS to receive orders for most of the more complex resale products, including in particular most centrex and all ISDN offerings. King Aff. ¶¶ 115-116. And Ameritech has not proved that it has corrected its acknowledged system error that has resulted in the double billing of over 8% of its resale customers. Id. ¶ 101. Its proposed solution is almost entirely manual, and it cannot cope with a commercially significant number of orders. Id. ¶¶ 102, 103. Even at current low volumes, MCI customers in Illinois are still having their accounts erroneously debited by Ameritech. Sanborn Aff. ¶. MCI customers are also inexplicably losing features they did order, or gaining features they did not, during the course of what ought to be no more complicated than a billing change. King Aff. ¶ 106.

Additionally, far too many of the most simple POTS orders sent electronically are "falling out" to manual handling. To be sure, some manual handling is inevitable for rare forms of orders, but fully 26.7% of Ameritech's orders for simple POTS required manual processing in the best months for which Ameritech provides data. Meixner Aff., Sch. 4; King Aff. ¶ 79. Manual processing also results in a high number of orders rejected for improper reasons: approximately half of MCI's orders are rejected, and a third of those rejects are caused by errors in Ameritech's systems. King Aff. ¶ 75. And because Ameritech's systems can identify and reject only one order error at a time, far too many of MCI's orders fall into a loop of repeated resubmission and rejection, some taking as much as one month to complete. Id. ¶ 144. While Ameritech claims it will solve this problem by July for orders handled electronically, the problem most frequently arises in orders handled manually, and there is no fix in sight for that problem. King Aff. ¶ 145.

Most troubling of all, manual processing has led to a serious backlog of resale orders, both for MCI and for AT&T. Even at the very modest level of orders currently being processed, at the end of May over 20% of MCI's simple POTS orders had not been completed six days after MCI placed the orders, counting only orders that remained uncompleted when MCI performed its analysis. Some of those orders were from as far back as April. King Aff. ¶ 92, 94. In contrast, Ameritech's own retail customers continue to get one-day service from Ameritech.

Ameritech has just recently been forced to acknowledge to the MPSC that the backlog is caused by a "spike" of a mere 2000 AT&T orders on several consecutive days, through a system that Ameritech advertises can process as many as 12,000/ orders per day. Meixner Aff. ¶ 36. Because of the high percentage or orders requiring manual handling, Ameritech's systems cannot handle any volatility in the number of orders received, MPSC Hearing, at 213; King Aff., ex. 13, even when, as here, AT&T correctly specified the number of orders that it would be sending to Ameritech. MPSC Hearing at 246. Of course, in the marketplace, apparently unlike Ameritech's testing environment, the number of orders placed varies significantly over time because volume increases significantly when carriers introduce new promotions or initiate new marketing campaigns. King Aff. ¶ 97. Companies do not usually give their competitors advance notice that they will be engaging in a marketing blitzes. Like local networks, OSS must be designed to handle peak loads, not average loads. Id.; Davis Aff. ¶ 36. Ameritech acknowledges that because of the high proportion of manual processing its resale OSS cannot operate in real market conditions. Until this problem is solved, competitors using resale face insuperable barriers to market entry.

Finally, Ameritech proposes a series of non-recurring charges for resale services totaling $131.50. Such charges are grossly in excess of what Ameritech charges its own retail customers, make resale uneconomical, and represent yet another barrier to resale entry. Ricca Aff. ¶ 7.

II. GRANTING AMERITECH'S APPLICATION WOULD NOT BE IN THE PUBLIC INTEREST.

A. The Public Interest Test

Congress' purpose in the 1996 Act was to encourage competition in all telecommunications markets, especially in the local telephone market where traditionally there has been little or no competition. Thus, the Conference explained that the purpose of the statute was

> to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all

telecommunications markets to competition . . . .

Conf. Rep. 104-458, 104th Cong. 2d Sess. (Jan. 31, 1996) at 113 [Conf. Rep.].

"The words 'public interest' in a regulatory statute . . . take meaning from the purposes of the regulatory legislation." NAACP v. FPC, 425 U.S. 662, 669 (1976). Congress intended that in making the various public interest determinations required under the Act the Commission would consider whether the proposal at issue "will promote competition." Conf. Rep. at 185. Ameritech is thus forced to assert the unlikely thesis that Michigan's monopolized local market will progress ineluctably towards full competition through the force of its own momentum, but the long distance market is a rigid oligarchy in critical need of a muscular new competitor.

Neither side of this equation can stand even the most cursory analysis. As a general matter, Congress operated from exactly the contrary understanding: the long distance market was "a truly competitive market"[28] that would be harmed, not helped, as a result of competition by a monopolist with bottleneck control over the local access market; while the mere "opening" of the local market was no guarantee that a competitive market would develop in due course. In Michigan, there is no evidence of the kind of market changes that could lead the Commission to conclude that the local market has become irreversibly competitive or that Ameritech could safely enter the long-distance market.

The 1996 Act was passed in a specific historical context: monopoly local markets resistant to competitive incursions, and a long-distance market that had become competitive only by the

[28] 141 Cong. Rec. S8464 (June 15, 1995) (Statement by Sen. Dorgan, a member of the Senate Commerce Committee).

construction of a sea wall between it and the monopoly local markets. Removing that sea wall "prematurely . . . risk[ed] damaging that competitive [long-distance] market."[29]

Congress' response was to maintain the structural separation imposed by the AT&T consent decree until market-based discipline in the local market could take its place. Although it removed many other telecommunications regulations immediately, it declined to remove the restriction on BOC entry into in-region long distance by a date certain.[30] Nor was Congress willing to assume that checklist compliance alone was a sufficient safeguard for long-distance competition. Ameritech's repeated suggestions to the contrary, Br. at 64, 71, are attempts to resurrect an amendment proposed by Senator McCain that would have established compliance with the checklist as sufficient to permit a BOC to enter the in-region long distance market. 141 Cong. Rec. S8043 (June 8, 1995) (Amendment 1261). But opponents of the amendment successfully argued that the Commission's discretion under the public interest requirement should be preserved to assure that working, competitive markets preceded BOC entry into in-region long-distance.[31] Congress thus made the legislative judgment that full implementation of the checklist could not alone guarantee that the local

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[29] Id.

[30] See S. Rep. No. 104-23, 104th Cong., 1st Sess. at 67 (Mar. 30, 1995) (additional views of Sen. Hollings).

[31] The House passed H.R. 1555, which omitted the Senate's public interest test and the requirement that "substantial weight" be given to the Justice Department's views. See H.R. Rep. No. 104-204, 104th Cong., 1st Sess. (July 24, 1995) (reporting H.R. 1555); 141 Cong. Rec. H8425, H8445 (Aug. 4, 1995) (amending H.R. 1555). The House approach was rejected by the Conference Committee. See Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 149 (Jan. 31, 1996).

market would become sufficiently competitive to be self-regulating.[32]

Congress insisted there be effective competition for local telephone service before the BOC in-region long distance restriction could be lifted because it was relying on that competition to provide market-based discipline to protect the long-distance market. See 141 Cong. Rec. S8134 (June 12, 1995) (statement of Sen. Kerry) ("Removing the separation between the local markets and other markets without ensuring that the Bell companies cannot use the local monopoly to hurt competition and long-distance could squander the gains of the past decade"); Conf. Rep. at 149 (expressing Congress' concern that BOCs should not be permitted into long distance if they can use their power in the local market to impede competition in the long distance market). So Congress enacted the public interest requirement to compel the FCC to satisfy itself that before any application was granted, changes in the local market sufficient to warrant reliance on market-based discipline had taken place. A principal proponent put the matter this way:

> The basic thrust of the bill is clear: competition is the best regulator of the marketplace. Until that competition exists, monopoly providers of services must not be able to exploit their monopoly power to the consumer's disadvantage. . . . Telecommunications services should be deregulated *after, not before*, markets become competitive.

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[32] Ameritech's assertion that Congress "emphatically rejected the imposition of a 'metric' test as a condition of interLATA authorization under Section 271," Br. at 63, is similar wishful thinking. In reality, Congress declined only to mandate a specific market share requirement. Although some members argued for the approach Ameritech claims Congress took, Congress rejected that approach, declining to prohibit the FCC from considering local market share in making the public interest determination. Compare 141 Cong. Rec. S7942, S7964 (June 8, 1995) (statement of Sen. Craig) (contending that the statute "should at a minimum state that any kind of market share test be barred from the FCC's consideration of this [public interest] standard."), with 41 U.S.C. § 271(d)(3) (imposing no limitations on the Commission's consideration of public interest factors).

142 Cong. Rec. S688 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings) (emphasis added).[33]

Requiring the FCC to consider, separately from checklist implementation, whether BOC entry was in the public interest was Congress' means of ensuring that telecommunications services would be deregulated *after, not before*, significant competition developed, and it embodied the legislative judgment that it was not possible to predict in advance or with certainty how quickly the local market would become competitive, or even what set of factors would assure the development of competitive markets. As Senator Kerry explained:

> The most difficult thing to have happen in the law that we are deliberating here is the competition at the local level. . . . I do not know if the checklist is going to work. . . . [The public interest test is included as a separate requirement in order] to make certain that in fact we do get competition at the local level.

141 Cong. Rec. S7942, S7970 (June 8, 1995).[34]

Thus, it is not sufficient that markets be merely "open" to competition, or that certain identified barriers to entry have been eliminated. Until competitors serve a full range of customers with a full range of services in commercially significant quantities, it is not possible to be sure that the

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[33]Members of the House shared the same intent and understanding. e.g., 142 Cong. Rec. E204 (Feb. 23, 1996) (statement of Rep. Forbes) ("[B]efore any regional Bell company enters the long-distance market, there must be competition in its local market. That is what fair competition is all about."); 141 Cong. Rec. H8458 (Aug. 4, 1995) (statement of Rep. Bunning) ("We should not allow the regional Bells into the long-distance market until there is real competition in the local business and residential markets.").

[34] Congress' concern that the course of the growth of local competition might be difficult to predict has proved to be well taken. At the time Congress passed the statute, it had been told by both cable companies and BOCs that cable operators were proceeding to enter the local telephone business and BOCs would soon offer cable programming. *See, e.g.*, Conf. Rep. at 148 ("meaningful facilities-based competition is possible, given that cable services are available to more than 95 percent of United States homes."). Competitive entry into these monopoly markets has proved more difficult than expected.

arrangements undertaken are capable of breaking the local monopoly. Until competitors provide a genuine choice of provider to most local telephone subscribers in the state, the public remains unprotected. Ameritech's underlying assumption that the FCC "owes" it entry into in-region long distance because it claims to comply with the checklist reads the *public's* interests out of the statute altogether.

The Commission's recent Access Charge Reform Order is instructive: particular services will be removed from price cap and tariff regulation as each "service becomes subject to *substantial* competition from new providers." *Order* at ¶ 258 (emphasis added). This standard was chosen because:

> Deregulation before competition has established itself . . . can expose consumers to the unfettered exercise of monopoly power and, in some cases, even stifle the development of competition, leaving a monopolistic environment that adversely affects the interests of consumers.

Access Charge Reform Order ¶ 270. The Commission's concerns, grounded solely in the effect deregulation of access charges would have on the *long distance* market, are doubly applicable to BOC entry requests where elimination of the line-of-business restriction affects not only the same *long distance* market but also the never-previously-competitive *local* market.

Thus, in the access charge context, the Commission has recognized that "it would be imprudent to prejudge the effectiveness of [the pro-competitive regime created by the 1996 Act, and implemented in the Local Competition Order and numerous state commission decisions] at creating competitive local markets." Access Charge Reform Order ¶ 269. Competition in local markets is at best in its infancy.[35] "[T]here will be areas and services for which competition may not develop." Id. at ¶ 267. The Commission accordingly determined that it was necessary to "retain many of the existing safeguards" with the expectation that the issue be revisited in the future, "in order to give competition sufficient time to develop substantially in the various markets for interstate exchange access services." Id. ¶¶ 267, 268. Analogous concerns apply here: competition is not yet sufficiently developed to rely on the market (along with the structural safeguards of § 272) to discipline anti-competitive behavior.[36]

To answer the question how thoroughly the local market must be transformed before long-distance entry is warranted, the Commission must evaluate the potential benefits to the public of granting in-region BOC entry against the potential risks.[37] Because BOC entry is not a now-or-never proposition, the evaluation required under the statute must consider the potential benefits and risks to the public of BOC entry *now* against the potential benefits and risks of BOC entry *later*. See generally In re Craig O. McCaw and AT&T, Mem. Op. and Order, 9 FCC Rcd. 5836, ¶ 61 (1994).

a. *Dangers to the long distance market of premature entry*. The BOC long-distance

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[35] See Second Report and Order 58 (CC Docket No. 96-149) (April 18, 1997) ("[a]lthough the 1996 Act establishes a framework for eliminating entry barriers and thereby fostering local competition, the evidence to date indicates that such competition is still in its infancy . . . . BOCs currently possess market power in the provision of local exchange and access services in their respective regions.").

[36] Nor is it the case that the only barriers to entry that the FCC should consider are those within control of the BOCs themselves. The power Congress delegated to the Commission was the power to determine whether entry was in the *public* interest, not the power to determine whether the BOCs' good behavior should be rewarded by long-distance entry. In any event, here, many of the critical barriers to entry are very much within Ameritech's own control.

[37] See Schwartz Aff. ¶¶ 18-19, 158-169 (engaging in similar weighing of costs and benefits, and finding limited benefits to BOC long-distance entry, and significant costs with premature entry).

restriction was imposed only after years of Bell System anticompetitive abuse of its bottleneck control of local access.[38] That restriction permitted competition in the long distance market to develop, because BOCs no longer had incentives to favor one long distance company over another in providing local access and related services. As this Commission has recognized, authorizing a BOC to enter in-region long distance reinstates the anti-competitive incentives that repressed competition in long distance until structural separation. See Access Charge Reform Order ¶ 278.[39]

To the extent that the BOCs control local services, they continue to have multiple opportunities to act on those incentives, despite the regulations in place to deter anti-competitive behavior. BOCs with local market power have the ability to withhold their cooperation from long distance carriers, driving up their competitors' costs and reducing the quality of service they provide to customers.[40] Hall Aff. ¶6; Hatfield Aff. pp. 14-28; Guggina Aff., passim. Absent the line-of-business restriction, this problem can be solved only by a competitive local market, where long-distance customers can be directed to another local carrier if their service deteriorates (or their phone bills rise).

Moreover, regulators will find it difficult to police BOC non-cooperation effectively,

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[38] United States v. Western Elec. Co., 797 F.2d 1082, 1088 (D.C. Cir. 1986); MFJ Opinion, 552 F. Supp. at 189.

[39] See MFJ Opinion, 552 F. Supp. at 167-168.

[40] SNET's decision to discontinue its practice of providing one-stop billing to AT&T's long distance customers is a recent example of such withdrawal of cooperation. Hall Aff. ¶¶ 243-244 Baseman/Warren-Boulton Aff. ¶25.

especially that which falls short of blatant discrimination.[41] The 13 years experience with equal access are no assurance against discrimination with respect to new and untested types of access. New requirements for interconnection will provide the BOCs with ample opportunity to scuttle competitors' new services in ways that regulators cannot effectively control. Hatfield Aff. pp. 8-22.[42] The BOC will always have plausible reasons for its non-cooperation. It is simply not possible for regulators to determine whether a BOC is facilitating or impeding progress when there are no pre-existing precedents or standards by which to judge the BOC's behavior. See Schwartz Aff., at ¶ 136; ¶ 145-48; Hatfield Aff. pp. 22-28.[43]

While the BOCs have multiple strategies available to them to raise their competitors' long-distance costs, they also have the ability artificially to lower the price of their own long-distance

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[41] See, e.g., First Report and Order, In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272, CC Docket 96-149, FCC 96-489, ¶ 19 (Dec. 23, 1996); Hatfield Aff. pp. 22-28; Hall Aff. ¶¶ 25-30, 66-67.

Despite the efforts of state regulatory commissions and this Commission, regulatory remedies proved to be uncertain, slow, and costly -- even where there was blatant discrimination in violation of clear regulatory requirements. See, e.g., MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1145, 1157 (7th Cir.), cert. denied, 464 U.S. 891 (1983).

[42] For example, a BOC can claim that implementing a particular feature for an IXC would cause harm to the BOC's network. It can refuse to provide certain types of interconnection unless the signaling messages pass through a "filter" controlled by the BOC, while limiting the types of messages that can pass through the filter. Alternatively, a BOC can simply delay its competitors' implementation, by, for example, requiring answers to numerous, unnecessary questions, by requiring extensive study of the request, or by proceeding slowly to implement competitors' requests. See Hatfield Aff., pp. 19-21. BOCs can also stall the standards process, making it difficult for competitors to interconnect with BOC network. See Guggina Aff., passim.

[43]Neither is the separate affiliate requirement of § 272 sufficient to police such anti-competitive behavior. If a long distance company asks for an interconnection arrangement the BOC's affiliate does not presently use, it will be difficult for regulators to detect or prove the BOC's anti-competitive conduct.

service in a targeted manner to increase market share or win a particular segment of the market, while still making a profit. As the Commission itself acknowledged, under its recent orders the access charges imposed on long distance carriers will remain significantly higher than cost. [cite] See also, e.g., Affidavit of Marius Schwartz, Tab C of the DOJ SBC Evaluation (hereafter, "Schwartz Aff.") at ¶ 121 n.47. For so long as this remains the case, BOCs can use the inflated charges to undercut competition, by forfeiting some of their bloated access charge revenues without having to price below their own cost. Such access charge-based price squeezes by BOCs permit BOCs to gain market share because of a regulatory advantage, not because they are more efficient. See Schwartz Aff. ¶ 121. Nor is such a price squeeze in the public interest on the theory that at least some customers are spared the BOC's bloated access charges: such targeted reductions help preserve the BOC monopoly while, as the Commission has made clear, competition should drive access charges towards cost for all customers.

While the Commission acknowledged that consumers are best "protected" when "goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production," id., it chose a market-based mechanism for reducing access charges to cost, on the ground that "[c]ompetitive markets are superior mechanisms" for accurately achieving these ends. Access Charge Reform Order ¶ 263. The Commission's ruling thus makes effective local competition critical, not only for purposes of § 271, but also to achieve the market reforms anticipated in the Access Charge Reform Order. That policy is predicated upon the existence of a competitive market where "IXCs that now purchase interstate switched access services from incumbent LECs will be able to bypass those services where the prices (interstate access charges) do not reflect the economic costs of providing the underlying services." Id. at ¶ 265. Where, as here, IXCs do not yet have the ability to bypass the BOC, there is no restraint on BOC manipulation of access charges, and the public is not protected.

Another anti-competitive abuse available to BOCs is the cross-subsidization of their long distance affiliates with inflated revenues from the local market obtained by misallocating long distance costs as local costs, and so requesting inappropriately high local rates.[44] This disserves the public interest by raising prices to the BOC's local customers as well as distorting the long distance market to the disadvantage of the state's long distance customers. It is extremely difficult for regulators to detect this kind of cost-shifting. See, e.g., Schwartz Aff. ¶ 111.[45] Even where states have adopted pure price caps will shelter an incumbent that suffered an apparently "bad" year by raising the subsequent year's price cap to compensate. See Hall ¶110. Unless the local market is sufficiently competitive that BOC customers can easily switch to other local providers with more attractive rates, there is no constraint on such anticompetitive behavior by a BOC where costs are taken into account

[44] Contrary to Ameritech's contentions, cross-subsidization does not involve predatory, below-cost pricing. The commercial enterprise reporting results on a consolidated basis -- the BOC plus its long distance affiliate -- is not setting prices, even for a short period, below cost. Although the long distance affiliate, if costs were properly allocated, would show a loss, the Bell Holding Company would show sufficient profit to more than compensate. Thus, Ameritech's reliance on Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986), is entirely misplaced. That case involved below cost pricing, and the Court rejected the claim that a company would be willing to suffer real losses for a significant period of time without the possibility of recoupment.

[45] Thus, Ameritech's blanket assurance that the federal and local rules proscribing cross-subsidization precludes it from using revenue from its local service to subsidize entry into long distance, Br. at 80-81, cannot reasonably afford comfort.